# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 11, 2006 |
| V | No. 259432<br>Wayne Circuit Court |
| DONALD JUAN DEARMIN,<br><br>Defendant-Appellant. | LC No. 04-007822-01 |

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

Defendant appeals as of right his convictions of carjacking, MCL 750.529a, and assault with intent to do great bodily harm less than murder, MCL 750.84. We affirm the assault conviction, and vacate the carjacking conviction and remand for new trial.

Defendant's car collided with victim Jernard Everett's car, and an argument and fight ensued. During the fight, defendant took Everett's car keys from him. Defendant then got into Everett's car, and placed the key in the ignition, but Everett reached into the car and grabbed defendant's arm to prevent him from starting the car. Defendant never drove Everett's car. When nearby police sirens grew loud, defendant fled the scene.

Defendant first challenges his carjacking conviction, arguing that the evidence was insufficient to support the conviction. In reviewing his claim, however, it appeared to this Court that defendant was tried under a version of the statute that was no longer in effect at the time of the offense. We issued an order directing the parties to address the issue:

> SHOULD DEFENDANT'S CONVICTION BE VACATED, AND THE MATTER REMANDED FOR NEW TRIAL, ON THE GROUND THAT DEFENDANT WAS CHARGED, TRIED AND CONVICTED UNDER THE FORMER VERSION OF MCL 750.529a, RATHER THAN THE VERSION THAT TOOK EFFECT ON JULY 1, 2004?

In the order, we noted that "although the original charging document asserted that the offense occurred April 20, 2004, the charge was later amended, and the proofs supported, that the charge related to a date in July 2004, after the statute was amended." The parties filed supplemental briefs, and we now vacate defendant's conviction of carjacking and remand for new trial.

The prosecution concedes that a defendant must be tried under the law in effect at the time of the offense, but argues that the issue was waived by defendant's failure to make a timely objection before trial, and that defendant was not prejudiced because the amendment to the statute was insignificant so that the incorrect language in the charging documents and jury instructions did not affect defendant's substantial rights. We disagree.

While MCL 767.76 requires that an objection to a charging document be made before trial, the instant case involves more than a defect in the charging document. Defendant was tried under a version of the statute that was not in existence at the time the offense was committed. Thus, as the prosecution's argument anticipates, we must determine whether the amended offense is substantively different from the offense for which defendant was tried and convicted, and whether it is fair to say that defendant was, in effect, convicted of the proper offense.

Defendant was charged with carjacking under the following version of MCL 750.529a:

> (1) A person who by force or violence, or by threat of force or violence, or by putting in fear robs, steals, or takes a motor vehicle as defined in section 412 from another person, in the presence of that person or the presence of a passenger or in the presence of any other person in lawful possession of the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.

The statute that was actually in effect at the time of the offense, MCL 750.529a, as amended by 2004 PA 128, effective July 1, 2004, and under which defendant should have been tried states:

> (1) A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.
>
> (2) As used in this section, "in the course of committing a larceny of a motor vehicle" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle.

In accordance with the former version, the trial court instructed the jury on the "stole" or "took" requirement in the alternative. And, with regard to taking, the court instructed the jury on "dominion and control":

> Now with regards to the issue of the first element that the defendant stole or took a motor vehicle, on the issue of what constitutes a taking, the element of taking a motor vehicle from another person under the carjacking statute can be satisfied where the person takes the vehicle while the victim remains in it.
>
> A taking occurs when the defendant acquires possession of the motor vehicle through force or violence, through the threat of force or violence, putting the victim in fear.

> Physical separation of the victim from the car is not required as long as the defendant exercises dominion and control over the vehicle. All right.
>
> So the question is well, all right, what does dominion and control mean. Well, dominion and control is a legal term that means that someone has either physical control over a particular object or they have the right to control.
>
> Okay. Let me give you sort of an example. The glasses that I am holding in my hand right now, I have actual possession or control over.
>
> Now in terms of what constitutes the right to control, even through I don't physically have it, when I came in to work this morning, I parked my car behind the building, locked my car, stuck my keys in my pocket and came up here.
>
> Now even though my vehicle is not in the back in my chambers, because I have the keys to it, and I have locked it, and the keys are in my pocket, I retain the right to control it, even though it's physically not here.
>
> Same as if you were to, like if you were to go to the ball game this Sunday. You might park three blocks away, but if you lock your car and keep the keys, you have the right to control it.

While the new statute makes clear that actions taken in an attempt to commit a larceny are included in the ambit of the statute, it also makes clear that the required criminal act or attempt is a larceny. The prior statute referred to robs, steals or takes, and the trial court quite clearly focused on "takes," and broadly defined that term without any reference to the meaning of larceny. The court's instructions, because framed in terms of the prior statute, never referred to the meaning of larceny, which includes the element that defendant intended to permanently deprive the owner of the property. CJI2d 23.1. This distinction might be of little consequence under different circumstances. However, in the instant case, the distinction between the statutes might very well have affected the outcome.

Because defendant's substantial rights were affected when he was tried for a crime that was substantively different from the crime as it existed on the date defendant's conduct took place, his conviction must be vacated, and he may be retried under the proper statute.

Defendant next argues that the evidence was insufficient to support his conviction for assault with intent to do great bodily harm less than murder. We disagree.

In reviewing a sufficiency claim, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found all of the elements of the offense proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201 (1992). The standard is deferential and this Court must make all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *Id*.; *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997).

The elements of assault with intent to commit great bodily harm less than murder are: (1) an attempt or offer with force or violence to do corporeal hurt to another (an assault), (2) coupled with an intent to do great bodily harm less than murder. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995), citing *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992). Defendant contends that there was insufficient evidence of intent. The specific intent

element has been defined as "intent to do serious injury of an aggravated nature." *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986). A defendant's intent may be inferred by circumstantial evidence. *People v Eggleston*, 149 Mich App 665, 668; 386 NW2d 637 (1986). Proof of use of a dangerous weapon is not required. *Harrington*, *supra* at 428-429.

Here, there was testimony from more than one witness regarding defendant's repeated punches and kicks to Everett's head and body, some of which were delivered to Everett as he lay on the ground. Police at the scene testified that Everett's head was bleeding when they arrived. Three photos of Everett's head injuries, one of which required two stitches, were presented at trial. Everett testified he was taken to St. John's Hospital right after the incident where he was treated for several hours before being released. Defendant himself testified that he'd punched Everett more than once, he'd meant to hit Everett, he "attacked" Everett, and he was "furious" at the time. Based on this evidence, a rational trier of fact could have found that defendant intended to inflict "serious injury of an aggravated nature" on Everett beyond a reasonable doubt. See *People v Pena*, 224 Mich App 650, 659-660; 569 NW2d 871 (1997).

This Court will not disturb the jury's decision to give more weight to the testimony of witnesses Everett, Parker, Harwood, and Jackson than that of defendant that he never kicked Everett. The jury was able to see and hear the witnesses testify, and also saw the photographs of Everett's injuries. Determination of witness credibility is the function of the jury, not of the reviewing court. *McFall*, *supra* at 412, citing *Wolfe*, *supra* at 514-515.

Affirmed in part, and vacated in part and remanded for new trial. We do not retain jurisdiction.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Alton T. Davis